Supreme Court, U.S.
FILED
OCT - 8 2003
OFFICE OF THE CLERK

No. 03-203

In the Supreme Court of the United States

UNITED PHOSPHORUS, LTD., ET AL.,

Petitioners,

v.

ANGUS CHEMICAL COMPANY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

ANDREW J. PINCUS
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

MARK MCLAUGHLIN
TIMOTHY S. BISHOP
Counsel of Record
ANDREW S. MAROVITZ
NICOLA JACKSON
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for ANGUS Respondents
[Additional counsel listed inside cover]

BARRIE L. BREJCHA
Baker & McKenzie LLP
130 East Randolph Drive
Chicago, IL 60601
(312) 861-2782

Counsel for
Lupin Respondents

STEPHEN NOVACK
Novack and Macey LLP
303 West Madison Street
Suite 1500
Chicago, IL 60606
(312) 419-6900

Counsel for
ANGUS Respondents

QUESTION PRESENTED

Whether the Seventh Circuit was correct in holding, in accord with all of the appellate courts that have addressed the issue, that the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, restricts the subject matter jurisdiction of the federal courts where the alleged anticompetitive conduct is without any "direct, substantial, and reasonably foreseeable" domestic effects and the only potential injuries incurred are by foreign plaintiffs in foreign markets.

RULES 29.6 AND 14.1 STATEMENT

Respondents are ANGUS Chemical Company, ANGUS Chemie GmbH, the Estate of Freeman Hughes, Ollie W. Chandler, Lowell Pals, Gary W. Granzow ("ANGUS Respondents"); Lupin Laboratories, Ltd. (n/k/a Lupin, Ltd.) and D.B. Gupta ("Lupin Respondents").

Respondents ANGUS Chemical Company and ANGUS Chemie GmbH make the following disclosure statement: (1) the Dow Chemical Company is the parent of CanStates Holdings, Inc., which is the parent of ANGUS Chemical Company, which is the parent of ANGUS Chemie GmbH; (2) the Dow Chemical Company owns the stock of CanStates Holdings, Inc., which owns the stock of ANGUS Chemical Company, which owns the stock of ANGUS Chemie GmbH.

Respondent Lupin Laboratories, Ltd. has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioners are United Phosphorus, Ltd., Shroff's United Chemicals, Ltd., and J.C. Miller & Associates, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULES 29.6 AND 14.1 STATEMENT ii

STATEMENT 2

A. The Antitrust Claim 4

B. Lack Of Any Evidence Showing An Effect On United States Commerce 6

C. The District Court's Decision 9

D. The *En Banc* Court of Appeals' Decision 11

REASONS FOR DENYING THE PETITION 12

A. Every Court Of Appeals To Consider The Question Has Held That The FTAIA's "Domestic Effects" Test Limits The Subject Matter Jurisdiction Of The Federal Courts. 13

B. No Question Regarding Section 1 Of The Sherman Act Is Presented In This Case. 15

C. The Decision Below Is Entirely Consistent With This Court's Precedents Concerning Restrictions On Subject Matter Jurisdiction. 16

D. Review Is Inappropriate Because The District Court's Decision Makes Clear That The Outcome Of This Case Would Not Change Even Under Petitioners' Interpretation Of The FTAIA. 24

TABLE OF CONTENTS-Continued

Page

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: **Page**

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 24

Caribbean Broad. Sys., Ltd. v. *Cable & Wireless P.L.C.*, 148 F.3d 1080 (D.C. Cir. 1998) 13, 14

Carpet Group Int'l v. *Oriental Rug Imp. Ass'n*, 227 F.3d 62 (3d Cir. 2000) 13, 14

Coleman v. *United States Bureau of Indian Affairs*, 715 F.2d 1156 (7th Cir. 1983) 18

Den Norske Stats Oljeselskap AS v. *HeereMac VOF*, 241 F.3d 420 (5th Cir. 2001), cert denied, 534 U.S. 1127 (2002) 13, 14, 20

Empagran S.A. v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003) 13, 21

Fidenas AG v. *Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5 (2d Cir. 1979) 17

Filetech S.A. v. *France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998) 13, 14

Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Found.*, 484 U.S. 49 (1987) 17

Harris v. *United States*, 536 U.S. 545 (2002) 24

Hartford Fire Ins. Co. v. *California*, 509 U.S. 764 (1993) 16, 17, 22

TABLE OF AUTHORITIES-Continued

Page

Kauthar SDN BHD v. *Sternberg*, 149 F.3d 659 (7th Cir. 1998) 17

Kruman v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002) 13

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 22

McGlinchy v. *Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988) 13, 14

Mota v. *University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512 (5th Cir. 2001) 17

New Jersey v. *New York, S. & W.R. Co.*, 372 U.S. 1 (1963) 18

Orsay v. *United States Dep't of Justice*, 289 F.3d 1125 (9th Cir. 2002) 18

Sattazahn v. *Pennsylvania*, 123 S. Ct. 732 (2003) 24

Shirley v. *Maxicare Tex., Inc.*, 921 F.2d 565 (5th Cir. 1991) 18

Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) 19, 23

Textron Lycoming Reciprocating Engine Div. v. *UAW*, 523 U.S. 653 (1998) 23

TABLE OF AUTHORITIES-Continued

Page

Turicentro, S.A. v. *American Airlines, Inc.*, 303 F.3d 293 (3d Cir. 2002) 13

United States v. *Anderson*, 326 F.3d 1319 (11th Cir. 2003) 13

Verizon Md., Inc. v. *Public Serv. Comm'n*, 535 U.S. 635 (2002) 23

Statutes and Rule:

15 U.S.C. § 1 ..... 12, 15

15 U.S.C. § 2 3

15 U.S.C. § 6a 1, 2, 17

15 U.S.C. § 6a(1)(A) 3

15 U.S.C. § 6a(2) 24

Fed. R. Civ. P. 12 ..... 1, 5, 6, 13

Miscellaneous:

2 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (5th ed. 2002) 21

1A Areeda & Hovenkamp, ANTITRUST LAW (2d ed. 2000) 21

TABLE OF AUTHORITIES-Continued

Page

Bruce & Peirce, *Understanding the Export Trading Company Act and Using (Or Avoiding) Its Antitrust Exemptions*, 38 BUS. LAW. 975 (1983) 21

H.R. Rep. No. 97-686 (1982) ..... *passim*

Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779 (1986) 21, 23, 24

Posner, ANTITRUST LAW (2d ed. 2001) 22

Sen. Conf. Rep. No. 97-644 (1982) 3

United States Dep't of Justice & Federal Trade Comm'n, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (1995) 20

Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 Loy. Consumer L. Rev. 523 (2002) 19

BRIEF FOR THE RESPONDENTS IN OPPOSITION

The court below held that the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, limits the subject matter jurisdiction of the federal courts and that a motion to dismiss based on Section 6a should therefore be decided by the district court pursuant to Federal Rule of Civil Procedure 12(b)(1). Although the petition tries mightily to obscure the fact, there is no conflict among the courts of appeals with respect to this question—"all [of the courts of appeals] have treated the issue as one of subject matter jurisdiction" (Pet. App. 13a). Not a single appellate court has adopted the construction of Section 6a advanced by petitioners.

The federal government interprets Section 6a in the same way as the lower courts. It has consistently stated that Section 6a restricts the subject matter jurisdiction of the federal courts.

Moreover, the question presented by petitioners makes no difference to the outcome of this case. The court below noted respondents' contention that "[respondents] should win" whether Section 6a is interpreted to limit the courts' subject matter jurisdiction or to establish an additional element for foreign antitrust claims, stating that it was "a proposition on which we need pass no judgment." Pet. App. 6a. But it is clear from the district court's opinion that the court did not have to engage in the weighing of evidence to rule against petitioners—the district court repeatedly determined that there was "no evidence" supporting petitioners' position. Accordingly, petitioners' claims would have been rejected even under their view that the motion in this case should have been decided under summary judgment standards, rather than the Rule 12 standards that apply to questions of subject matter jurisdiction.

Faced with these insuperable obstacles to obtaining review by this Court, petitioners seek to muddy the waters in a variety of ways. First, they assert that this case provides an

opportunity for the Court to decide whether the "affecting commerce" requirement of Section 1 of the Sherman Act is a limitation on the federal courts' subject matter jurisdiction. But this case presents no question regarding Section 1 and the court below did not construe Section 1—the issue here relates solely to the FTAIA. Accordingly, the case presents no occasion to decide issues relating to Section 1.

Next, petitioners argue that review is appropriate because the decision below supposedly conflicts with this Court's decisions holding that other statutes with different statutory language, enacted in a different statutory context, do not limit federal courts' subject matter jurisdiction. Yet the Court has recognized repeatedly that this issue turns upon each particular statutory context. That is precisely the analysis that the court below utilized here.

Finally, petitioners assert that the Court should grant review in order to provide guidance to the lower courts in determining whether a statute restricts subject matter jurisdiction. But this Court does not provide abstract guidance; it addresses important legal issues on which the lower courts are divided. And it is difficult to understand why such guidance is needed in view of the unanimity among the courts of appeals with respect to the construction of the FTAIA.

Petitioners have thus failed to present any reason why review by this court is warranted here. The petition for a writ of certiorari should be denied.

STATEMENT

This case involves the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, a law enacted by Congress in 1982 to address concerns about the extra-territorial reach of the antitrust laws. The FTAIA provides in pertinent part that the federal antitrust laws "shall not apply to conduct involving trade or commerce * * * with foreign

nations unless" that conduct "has a direct, substantial, and reasonably foreseeable effect" on commerce within the United States. *Id.* § 6a(1)(A).

Congress in 1982 feared that U.S. companies were not engaging in international trade to the same extent as companies from other nations, possibly because concerns about antitrust liability prevented U.S. companies from collaborating in the international marketplace. The FTAIA was designed to eliminate that uncertainty by establishing a clear "jurisdictional threshold" for application of the antitrust laws. Sen. Conf. Rep. No. 97-644, at 30 (1982); see also H.R. Rep. No. 97-686, at 2-3, 5-6, 9 (1982). The House Committee explained that the "domestic 'effect' [standard would] serve as the predicate for antitrust jurisdiction," with a "court" deciding in the first instance if those "requirements for subject matter jurisdiction are met." H.R. Rep. No. 97-686, at 11, 13.

Petitioners, the plaintiffs in this antitrust action, claim that their plans to manufacture certain chemicals in India were disrupted by a state court lawsuit filed by respondent ANGUS Chemical Co.; petitioners alleged that the filing of that lawsuit violated Section 2 of the Sherman Act, 15 U.S.C. § 2. Several respondents moved to dismiss for lack of subject matter jurisdiction, asserting that the complaint failed to allege the "direct, substantial, and reasonably foreseeable" effect on United States commerce required by the FTAIA. The district court denied the motion, finding that the allegations of the complaint were sufficient, but the court warned petitioners that they would need "much more" to withstand a renewed motion to dismiss that controverted the complaint's allegations. *United Phosphorus, Ltd.* v. *ANGUS Chemical Co.*, 1994 U.S. Dist. LEXIS 14786, at *35 (N.D. Ill. Oct. 13, 1994).

Following four and one-half years of discovery, respondents filed a renewed motion on the ground that the evidence

adduced during discovery established that petitioners could not satisfy the FTAIA standard. Based upon its review of thousands of pages of evidentiary materials, the district court found that the undisputed evidence—including petitioners' own admissions—established that the alleged anticompetitive conduct "had no effect on any United States commerce" and that the court therefore lacked subject matter jurisdiction over the case. Pet. App. 49a. The en banc court of appeals affirmed.

Unfortunately, the statement of the case in the petition contains numerous conclusory assertions that have no support in the decisions below or in the evidentiary record. For example, petitioners state as a fact that they planned to manufacture chemicals in India "for sale worldwide" (Pet. 1), but that assertion was rejected by both courts below. Accordingly, we have set forth a more complete discussion of the facts demonstrating the lack of any evidence of an effect on United States commerce.

A. The Antitrust Claim

This case concerns Amino-1 Butanol ("AB"), a substance used in the manufacture of ethambutol—one of the primary drugs for treating tuberculosis—and 1-nitropropane ("1-NP"), which is used in the manufacture of AB. Respondent ANGUS Chemical Company ("Angus") was the world's only manufacturer of 1-NP during much of the 1991-1994 time period at issue in this case. Angus's German subsidiary, respondent ANGUS Chemie GmbH ("Chemie") was the world's only manufacturer of AB. India has the highest incidence of tuberculosis in the world, and a number of companies located in India (including respondent Lupin Laboratories, Ltd.) purchased AB from Chemie to make ethambutol.

In the early 1990s, two Indian chemical companies, United Phosphorus, Ltd. and Shroff's United Chemicals, Ltd.

("the Indian petitioners") planned to acquire the technology for making 1-NP and AB from Dr. John Miller, the owner of petitioner J.C. Miller & Associates, Inc. As the former Vice President of Research and Development at Angus, Miller "supervised Angus's propriet[ar]y efforts to improve its AB processes" and had unlimited access to the company's detailed manufacturing procedures. The Indian petitioners' principal, Rajju Shroff, tried to conceal Miller's involvement in the project—for example, falsely declaring in an application to the Indian government that the AB technology would be obtained from another scientist. Pet. App. 3a, 44a.

Once Angus learned that Miller would be supplying the technology to petitioners, Angus filed suit in Illinois state court to enjoin the misappropriation of its trade secrets. When faced with a discovery order that would have required disclosure of the very technology it sought to protect, Angus dismissed that lawsuit voluntarily. Pet. App. 3a, 45a.

Petitioners filed this antitrust action in 1994, claiming that but for the Illinois lawsuit, they would have sold AB, 1-NP, and other chemicals for profit. Pet. App. 3a-4a, 45a. The district court denied respondents' initial Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction under the FTAIA. Brought before any discovery, the motion was a facial challenge to the jurisdictional sufficiency of the complaint. Pet. App. 2a. At that stage, the court determined that the complaint's "broad, conclusory allegations" adequately asserted a domestic effect. "As the case proceeds," the court warned, petitioners would need "much more" to survive dismissal. *United Phosphorus*, 1994 U.S. Dist. LEXIS 14786, at *24, *35.

Following exhaustive discovery over a period of four and one-half years, respondents renewed their Rule 12(b)(1) motion to dismiss, this time relying on the evidence developed during discovery. Respondents moved in the alternative for summary judgment on the FTAIA issue (in the

event the district court determined that Rule 12 was inapplicable) and on other grounds.

B. Lack Of Any Evidence Showing An Effect On United States Commerce

The district court's opinion contains a detailed discussion of the evidence placed before it in connection with respondents' motion to dismiss or, in the alternative, for summary judgment. Petitioners say they "disagreed with virtually every [jurisdictional] fact" on which respondents relied (Pet. 4), but—other than a few broad and conclusory assertions—petitioners' discussion of the facts relates solely to tris amino and AMP, two chemicals that were at the periphery of the case in the district court. And, as we explain below, even that discussion is off the mark: petitioners' own employee testified that there had been no research and development efforts with respect to these substances. The district court correctly determined that petitioners failed to establish the requisite effect on United States commerce with respect to *each* of the chemicals at issue in this case.

Commerce in AB. The district court concluded that petitioners "have put forth no evidence tending to show that, but for the claimed antitrust violations, they would have sold AB domestically." Pet. App. 55a. Petitioners' exclusive focus on foreign sales is apparent from the entire history of their plans with respect to AB. The Indian petitioners admitted that they became interested in manufacturing AB when their consultant indicated it was a "good project for India," where 90-95% of the world's AB supply was purchased. *Id.* at 50a-51a. The record demonstrates that thereafter Shroff, Miller, and those working with them repeatedly discussed AB as a product for India. As their chemical broker stated, "'the market for it is in India with no U.S. business.'" Pet. App. 51a-52a; see Pet. App. 17a.

Other factors confirmed that petitioners' plans were confined to India and that they were not looking to sell AB in the United States. Petitioners admitted that they spoke only to potential customers located in India, and their proposed AB plant had an annual capacity precisely matching demand for the product in India. Pet. App. 52a-55a. Shroff and Miller both testified that they knew of no use for AB except in manufacturing ethambutol, which is not made in the United States. Pet. App. 52a-53a. The one company in the world with FDA approval to *sell* ethambutol in the U.S. at that time produced the drug in Italy with AB from India. Petitioners conceded they never spoke to anyone at that company "about the possibility of selling AB." Pet. App. 53a-57a.[1]

In sum, "[a]s [petitioners'] own liability expert agreed, 'any effect upon United States commerce, based on what [he has] seen with respect to AB sales' would be 'less than substantial.'" Pet. App. 55a. The district court accordingly found, based on these admissions, that petitioners "had no actual plans to sell AB in this country and that there would have been no significant AB sales opportunities for [petitioners] in this country even if they had tried to sell AB here." Pet. App. 54a-55a.

Commerce in 1-NP. Petitioners' "1-NP plans were limited to 1-NP production for [their] own use to make AB." Pet. App. 60a. Shroff testified that "[t]here's no market" for 1-NP other than for the manufacture of AB and that he intended to produce 1-NP "for our own requirements." *Ibid.* Therefore, Miller admitted, petitioners "never identified a single potential American consumer for 1-NP." *Ibid.*; see also *id.* at 61a (noting that petitioners' damages expert had

---

[1] American laboratory supply houses do offer AB in small gram quantities. Petitioners had no "discussions with a single American supply house," which, regardless, would have resulted in only insignificant sales—and no "substantial effect" on U.S. commerce—due to the "tiny volumes" involved. Pet. App. 54a.

not opined that they were entitled to any damages for lost sales of 1-NP).

Indeed, "it is unclear whether [petitioners] would have manufactured 1-NP for their own use in the production of AB," because they had identified an alternative method of production that did not require 1-NP. Pet. App. 61a. Petitioners thus had not made even the most preliminary preparations for the new plant that would be needed to produce 1-NP. Pet. App. 60a-61a. As the district court found, petitioners never demonstrated they would have made 1-NP; they had no "firm plans" and ultimately settled on a manufacturing process for AB that did not require 1-NP. Pet. App. 61a-62a.

Commerce in Other Chemicals. Petitioners argued that because they were prevented from manufacturing 1-NP, they were also prevented from producing three other nitroparaffins—all byproducts of one method of making 1-NP. The record showed, based on admissions from Shroff and Miller, that "[i]f plaintiffs had manufactured 1-NP * * *, they would have done so using a [different] method that produces no other chemicals." Pet. App. 63a.

As for the three nitroparaffin derivatives that petitioners also claim they would have produced—bronopol, tris amino, and AMP—the Indian petitioners' head of research testified that petitioners had undertaken no "research and development efforts" with respect to tris amino and AMP and had never completed the "very preliminary report" of his lab work on bronopol. Pet. App. 65a. In addition, the Indian petitioners' decisions "about which products to pursue were made by a committee that kept written minutes" but "*no* documents were produced reflecting a plan to manufacture these chemicals." *Ibid.* (emphasis added).

The petition points to a statement by Miller "at the very outset of his relationship with" the Indian petitioners about

the potential market for sales of tris amino in the United States. Pet. 5. But the Indian petitioners' principal testified that the sole step the Indian petitioners took toward manufacturing the chemical was a "literature survey" which, Shroff conceded, failed to "identify a single use or potential buyer for [either] tris amino or AMP." Pet. App. 64a. Where a market for those products *might* exist is therefore irrelevant.[2]

In sum, as explained by the district court, petitioners "cannot point to *any* evidence showing that they had developed a plan to manufacture and sell" these other nitroparaffins, nitroparaffin derivatives, or any of the remaining chemicals listed in the complaint "in any quantity, much less quantities that constitute a 'substantial effect' on domestic commerce." Pet. App. 67a (emphasis added).

C. The District Court's Decision

In accordance with its detailed findings with respect to specific chemicals, the district court held that even if the allegations of anticompetitive conduct in bringing the Illinois suit were credited, the "undisputed" record demonstrated no domestic effect—because petitioners had focused entirely on the marketplace in India. Pet. App. 67a, 74a n.7. Petitioners "would have only been injured abroad," the court ruled, and defendants' conduct "can have had *no effect* on any United States commerce in the chemicals [petitioners] state they would have manufactured." Pet. App. 49a, 67a (emphasis

---

[2] Petitioners rely (Pet. 5) on the complaint Angus filed in the Illinois action. Even if that complaint were somehow relevant after the full discovery in this case (and the district court concluded it was not (Pet. App. 70a-72a)), an allegation that Miller intended to manufacture tris amino and AMP—without stating where those chemicals would be manufactured or where they would be sold—does "not show [what petitioners] must prove"—"that they intended to and were prepared to sell [the chemicals] *in the United States*." Pet. App. 72a (emphasis added).

added). The record was "also undisputed" that it was petitioners' own business decisions, not anything respondents had done, that caused them to forego manufacturing opportunities. Pet. App. 67a. Petitioners admitted that they had decided to wait for *this* litigation to conclude before pursuing their plans to make the chemicals at issue. Pet. App. 59a, 65a.

Under the FTAIA, the court held, this "failure to establish any anticompetitive domestic effect [is] jurisdictional" and "requires dismissal of [petitioners'] antitrust claims." Pet. App. 49a, 67a. The court rejected petitioners' "unprecedented position" that the FTAIA establishes an additional substantive element for antitrust claims. Relying on "[c]ase law, and other authorities [that] uniformly agree that the FTAIA limits the 'jurisdiction' of American courts over antitrust claims involving foreign commerce," the district court saw the answer as "clear." Pet. App. 72a-75a. The district court therefore granted respondents' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Pet. App. 79a. In its judgment, the court alternatively granted respondents' motion for summary judgment on that same basis. C.A. App. A-25.[3]

---

[3] Petitioners maintain (Pet. 6 n.8) that the district court did not grant respondents' Rule 56 motion because that ruling was not contained in its opinion. Pet. 6 n.8. This requires ignoring the court's judgment, as memorialized in its minute order. C.A. App. A-25. Moreover, as petitioners acknowledged in the court of appeals, the district court "did not expressly say * * * that it weighed the evidence." Pls. C.A. Br. 36. The reason the district court did not say so is that its factfinding depended on "undisputed" evidence and thus—any ambiguity as to the scope of its ruling aside—complied with the requirement that on summary judgment the evidence must be viewed in the light most favorable to the non-moving party. Pet. App. 67a (relying on petitioners' failure to "point to any evidence"); *id.* at 69a ("no evidence" to support petitioners' contention); *id.* at 75a n.7 (relying on "the undisputed record").

D. The *En Banc* Court of Appeals' Decision

The court of appeals heard the case *en banc* to address whether the FTAIA's requirement of a "direct, substantial, and reasonably foreseeable effect" on United States commerce "goes to the court's subject matter jurisdiction," or instead "states an additional element of a Sherman Act claim." Pet. App. 2a, 4a. The court of appeals affirmed the district court by a divided vote, holding that the FTAIA limits the subject matter jurisdiction of the federal courts.

The court of appeals carefully analyzed this Court's precedents, the unanimous view of the other courts of appeals on this question, the FTAIA's legislative history, the Justice Department's interpretation of the statute, the views of antitrust scholars, and relevant policy considerations. "[W]hile it might seem desirable," the court observed, "to have no messy extra jurisdictional requirements under some acts of Congress, but not others," it is clear that "Congress has the power to limit the jurisdiction of the federal courts." The court concluded that Congress in the FTAIA had restricted the courts' subject matter jurisdiction. Pet. App. 15a-17a.

Applying that standard to the present case, the court of appeals upheld the district court's determination that the requisite connection to United States commerce was not present. The court observed that the district court's analysis of the facts was "thorough" and that petitioners "do not tell us how [those] findings are clearly erroneous." Pet. App. 2a, 17a-18a.

The dissenting judges acknowledged that "several courts of appeals have decided dismissal motions based on the FTAIA under the rubric of 'subject matter jurisdiction,'" but nonetheless concluded that the Act's "effect on commerce test [was] an element of the plaintiffs' claim." Pet. App. 23a, 35a-36a.

REASONS FOR DENYING THE PETITION

The petition satisfies none of the criteria for a grant of certiorari. The decision below is correct and does not conflict with any decision of another court of appeals or with this Court's precedents. The Seventh Circuit's determination that the FTAIA limits the federal courts' subject matter jurisdiction, rather than adding a substantive element to a plaintiff's antitrust claim, is consistent with unanimous appellate authority on the issue and follows directly from the statutory text.

Petitioners' other arguments for certiorari are equally unavailing. First, because Congress's intent to circumscribe the federal courts' jurisdiction is so clearly expressed in the FTAIA, the ruling below adheres to, rather than deviates from, the standards applied by this Court to determine when a statute is jurisdictional.

Next, the purported conflict with respect to the "affecting commerce" element of Section 1 of the Sherman Act, 15 U.S.C. § 1, is irrelevant here. The court below construed the FTAIA, not Section 1. Granting review in this case would not bring before this Court any issue with respect to Section 1.

Finally, even if petitioners' interpretation of the FTAIA were adopted, they would still lose in this case. The district court's opinion makes clear that even under a summary judgment standard, the only possible conclusion is that petitioners cannot establish the requisite effect on United States commerce.

In sum, petitioners have presented no reason why the Court should grant review, and the petition accordingly should be denied.

A. Every Court Of Appeals To Consider The Question Has Held That The FTAIA's "Domestic Effects" Test Limits The Subject Matter Jurisdiction Of The Federal Courts.

All six of the other courts of appeals to address the issue have concluded—in accord with the decision below—that the FTAIA restricts the courts' authority to adjudicate the case. No appellate court has adopted petitioners' view of the statute. See *Filetech S.A.* v. *France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) (holding that "the FTAIA forbids the exercise of jurisdiction over Sherman Act violations" unless its conditions are met, and reversing the district court for failing to weigh evidence in accordance with Fed. R. Civ. P. 12(b)(1)); *Carpet Group Int'l* v. *Oriental Rug Imp. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000) ("the primary question presented is whether the District Court possessed subject matter jurisdiction over the plaintiffs' antitrust claims in light of the FTAIA"); *Den Norske Stats Oljeselskap AS* v. *HeereMac VOF*, 241 F.3d 420, 428 (5th Cir. 2001) ("the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs" when the statute's requirements not fulfilled); *McGlinchy* v. *Shell Chem. Co.*, 845 F.2d 802, 813 (9th Cir. 1988) (district court properly dismissed claim because the FTAIA "precluded subject matter jurisdiction"); *United States* v. *Anderson*, 326 F.3d 1319, 1329 (11th Cir. 2003) (the FTAIA restricts "American courts' jurisdiction"); *Caribbean Broad. Sys., Ltd.* v. *Cable & Wireless P.L.C.*, 148 F.3d 1080, 1085 (D.C. Cir. 1998) ("a court has subject matter jurisdiction only to the extent that" the FTAIA is satisfied).[4]

---

[4] See also *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 345 (D.C. Cir. 2003) (failure to satisfy FTAIA's provisions does not "authoriz[e] subject matter jurisdiction"); *Turicentro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293, 299-300, 305 (3d Cir. 2002) (subject matter jurisdiction was lacking where defendants' alleged conduct did not "affec[t] the domestic economy"); *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384, 389-390 (2d Cir. 2002) (using

Petitioners assert that these cases "may be 'drive-by jurisdictional rulings' [without] precedential effect." Pet. 24-25. Even if that assertion were correct, that would mean that the only decision to address the issue is the one in this case. And there would be no reason for this Court to grant review with respect to an issue that had been decided by only a single court of appeals.

But petitioners are wrong: the other courts of appeals have thoroughly considered the issue. For example, in *Filetech* and *HeereMac* the Second and Fifth Circuits reviewed the FTAIA's language and the prior case law as to the Act's jurisdictional scope, and assessed whether subject matter jurisdiction existed only after fully discussing Rule 12(b)(1) standards. *Filetech*, 157 F.3d at 931-932; *HeereMac*, 241 F.3d at 424-431. In fact, the *Filetech* court reversed precisely because the district court had failed to weigh jurisdictional facts. 157 F.3d at 932.[5] The court below correctly concluded that "[w]e simply cannot dismiss these cases as 'drive-by' jurisdictional rulings." Pet. App. 14a.

Given this unanimity among the courts of appeals, there is no reason for this Court to address the issue presented in the petition.[6]

12(b)(1) standards to review district court's dismissal of claims under FTAIA "for lack of subject matter jurisdiction").

[5] See also, *e.g.*, *McGlinchy*, 845 F.2d at 813-815; *Carpet Group*, 227 F.3d at 69-73; *Carribean Broad.*, 148 F.3d at 1085-1087.

[6] Petitioners assert (Pet. 25-27) that the Third and Fifth Circuits apply "special procedural rules" with respect to the jurisdictional inquiry under the FTAIA. They suggest that review is warranted here to consider an alleged conflict between those rules and the procedural approach used by other courts in determining whether the subject matter jurisdiction standard has been satisfied. But petitioners never argued for the application of these "special procedural rules" in the district court or in the court of appeals; they therefore cannot raise

B. No Question Regarding Section 1 Of The Sherman Act Is Presented In This Case.

Unable to establish a conflict among the courts of appeals with respect to the construction of the FTAIA, petitioners argue that certiorari should be granted here because of an alleged conflict concerning a separate statutory provision that was *not* the subject of the court of appeals' holding—Section 1 of the Sherman Act, 15 U.S.C. § 1. Petitioners assert (at 16) that there is "longstanding confusion" as to whether Section 1's requirement of proof of a sufficient effect on interstate commerce is jurisdictional, merits-based, or a combination of both, and urge the Court to grant certiorari in this case to resolve that issue.

The difficulty with petitioners' argument is that this case simply does not present that question: the issue decided by the courts below related solely to the FTAIA, not to Section 1 of the Sherman Act. In the course of its decision, the court of appeals did examine "domestic Sherman Act cases, which do not implicate FTAIA, but may shed some light by analogy" (Pet. App. 8a). But that brief discussion—in which the court itself emphasized that it was merely identifying a possible analogy—no more constitutes a holding with respect to Section 1 than the court of appeals' discussion (*id.* at 12a) of the federal criminal code provision relating to destruction by means of fire or explosives (18 U.S.C. § 844(i)) constitutes a holding with respect to that statute. There is no Section 1 issue in this case for the Court to review.

Nor can it be argued that the court of appeals' decision concerning the FTAIA is somehow controlling with respect

---

that issue here. And petitioners do not even try to argue that these rules would make any difference in this case, where comprehensive discovery has been completed and the district court repeatedly found that petitioners had failed to present "any evidence" in support of their position.

to Section 1. The two provisions have completely different statutory language and different statutory contexts; and they were enacted at different times and have different purposes. Indeed, Congress made clear the limited scope of the FTAIA when it enacted the statute: "the effect of the legislation on current antitrust law" would be limited to removing "possible ambiguity" regarding the exercise of subject matter jurisdiction in extraterritorial disputes. H.R. Rep. No. 97-686, at 5, 13. The court of appeals relied upon concerns unique to the extraterritorial context in construing the FTAIA —concerns that are irrelevant to the interpretation of Section 1.

Indeed, petitioners' own argument confirms the absence of any necessary link between the FTAIA issue in this case and the construction of Section 1. Petitioners point out that the Second Circuit has held that the FTAIA limits subject matter jurisdiction, but that the "affecting commerce" language of Section 1 does not. The Fourth Circuit has adopted the same view. Pet. 27. If the two statutes were inextricably linked, these circuits could not have adopted these distinct interpretations of the two provisions.

For all of these reasons, there is no basis whatever for this Court to address the Section 1 issue in this case.

C. The Decision Below Is Entirely Consistent With This Court's Precedents Concerning Restrictions On Subject Matter Jurisdiction.

Petitioners also argue (at 10-16) that certiorari is warranted because the court of appeals' determination is inconsistent with this Court's precedents. That is simply wrong.

To begin with, the Seventh Circuit's ruling accords with this Court's decision in *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 795-796 & n.23 (1993), in which the Court addressed the FTAIA in the course of its discussion of

subject matter jurisdiction. Petitioners contend (at 23) that *Hartford Fire* needs "clarification," but the consensus in the courts of appeals shows that there is no confusion about this Court's decision.[7]

Moreover, the decision below is consistent with the standards that this Court applies in determining whether a statute circumscribes subject matter jurisdiction. The "starting point" for such inquiries is the "language of the statute itself." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987). The FTAIA provides that the antitrust laws "shall not apply" unless the activity complained of has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, and such effect "gives rise" to an antitrust claim. 15 U.S.C. § 6a.

Courts consistently have construed "shall not apply" as jurisdiction-stripping language when it appears in statutes with extraterritorial reach.[8] Congress's use of this phrase in

---

[7] *Hartford Fire*'s statement that some of the insurers had "concede[d]" jurisdiction is too thin a reed to support petitioners' claim of uncertainty. See Pet. 23-24. The Court itself determined that "the District Court undoubtedly had jurisdiction of these Sherman Act claims" (*Hartford Fire*, 509 U.S. at 795), as it had to do because subject matter jurisdiction may not be established by consent.

[8] See, *e.g.*, *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 664, 667 (7th Cir. 1998) (15 U.S.C. § 78dd(b)'s instruction that Securities Exchange Act "shall not apply" to securities transactions "without the jurisdiction of the United States" precludes federal courts from exercising jurisdiction absent substantially domestic material misconduct); *Fidenas AG* v. *Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 6, 8, 10 (2d Cir. 1979) (pursuant to § 78dd(b), court lacked "subject matter jurisdiction" over "predominantly foreign" Securities Exchange Act claim); *Mota* v. *University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 524 (5th Cir. 2001) (42 U.S.C. § 2000e-1(a)'s direction that Title VII "shall not apply to an employer with respect to the employment of

the FTAIA thus establishes its intent to restrict the authority of federal courts.

It would be odd indeed to suppose that such plainly restrictive language simply refers to an element of an antitrust claim. That approach would permit a plaintiff to bring—perhaps even to trial—the very disputes the Act precludes because they lack a meaningful connection to U.S. interests.

Petitioners propose a mechanical rule (Pet. 11-12) under which the absence of the word "jurisdiction" in the Act would automatically foreclose a jurisdictional reading. This Court has never endorsed that approach, however. "Shall not apply" means what it says—if a plaintiff's complaint derives from conduct with purely foreign effects, the doors to the federal courthouse are shut. The term "jurisdiction" has no talismanic force; it is neither necessary nor sufficient to render a provision jurisdictional. "[N]othing is quite that simple," as the Seventh Circuit pointed out. Pet. App. 13a.

---

aliens outside any State" means that "subject matter jurisdiction would not be present" in that circumstance).

"Shall not apply" is also routinely interpreted as jurisdictional in other types of statutes. See, *e.g.*, *New Jersey* v. *New York, S. & W.R. Co.*, 372 U.S. 1, 7 n.5 (1963) (provision that a statute "shall not apply" to certain railroad operation "eliminated the Interstate Commerce Commission's jurisdiction"); *Orsay* v. *United States Dep't of Justice*, 289 F.3d 1125, 1132-1136 (9th Cir. 2002) ("subject matter jurisdiction" was lacking under Federal Tort Claims Act provision stating that the statute "shall not apply" where claims involve discretionary function); *Shirley* v. *Maxicare Tex., Inc.*, 921 F.2d 565, 567 (5th Cir. 1991) (29 U.S.C. § 1003(b) deprives the court of "subject matter jurisdiction" by providing that ERISA "shall not apply" to certain benefit plans); *Coleman* v. *United States Bureau of Indian Affairs*, 715 F.2d 1156, 1163-1164 (7th Cir. 1983) (where provision indicated that allotment statute "shall not apply" to certain Indian tribal lands, it was "interpreted to exclude jurisdiction").

See, *e.g.*, *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (refusing to treat provision as limiting subject matter jurisdiction merely because it contained the term "jurisdiction").

The background and legislative history of the FTAIA confirm this reading of the statute. The FTAIA grew out of concern that American firms had begun to lag behind in international trade because of uncertainty regarding the application of the antitrust laws:

> Congress wanted to make clear a very simple proposition—U.S. firms can engage in anticompetitive conduct that injures foreign markets and foreign buyers. We do not care because either it is good for us, it is none of our business, or at a minimum it is somebody else's business.

Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 Loy. Consumer L. Rev. 523, 529 (2002).

The House committee report specifically stated that the FTAIA was to be a "jurisdictional test," applied "at the jurisdictional stage" of a case, intended to "exempt [specified conduct] from the antitrust laws." H.R. Rep. No. 97-686, at 9, 10. The "domestic 'effect' [would] serve as the predicate for antitrust jurisdiction," with a "court" deciding in the first instance if those "requirements for subject matter jurisdiction are met." *Id.* at 11, 13.

Petitioners' assertion (at 15 n.12) that the House Report is "obviously" referring to "the substantive scope of the antitrust laws" is flatly at odds with these passages. The portion of the report cited by the Seventh Circuit is conclusive:

> [The FTAIA] only establishes the standards necessary for assertion of United States antitrust jurisdiction. The

> substantive antitrust issues on the merits of the plaintiffs' claim would remain unchanged.

H.R. Rep. No. 97-686, at 11. The consistent message of the congressional reports, which is amply supported by the statutory text, is that the FTAIA concerns "subject matter jurisdiction," and not "the legal standards for determining whether conduct violates the antitrust laws." *Id.* at 13.

Moreover, the federal agencies charged with antitrust enforcement have interpreted the statute as restricting subject matter jurisdiction. The 1995 Antitrust Enforcement Guidelines for International Operations issued by the Department of Justice and Federal Trade Commission identify the FTAIA as supplying one of "the principal tests for subject matter jurisdiction in foreign commerce cases." ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (1995). And the government has expressed the same view in a brief filed in this Court. See Brief for the U.S. and FTC as Amici Curiae at 11, *Statoil ASA* v. *HeereMac VOF*, No. 00-1842 (U.S. Jan. 2002) (the FTAIA "confers subject matter jurisdiction" over a claim that arises from "anticompetitive effects on domestic commerce").[9]

---

[9] This Court denied review in that case. See 534 U.S. 1127 (2002).

In *HeereMac*, there was no dispute that the effect on United States commerce required by the first prong of the FTAIA (Section 6a(1)) had been established; the case involved the question whether the second prong of the FTAIA (Section 6a(2)) allows subject matter jurisdiction when the particular plaintiff has not suffered injury in the United States market and has only been injured abroad. See 241 F.3d 420. That issue is not implicated in this case because petitioners' failed to meet the threshold requirement of Section 6a: the alleged anticompetitive conduct here had *no effect at all* on U.S. commerce. The separate question addressed in *HeereMac* regarding the *second* prong of the FTAIA is one on which the courts of appeals are now deeply divided. See, *e.g.*, *Empagran S.A.* v. *F. Hoffman-LaRoche*,

Antitrust scholars also have concluded that the FTAIA establishes a jurisdictional bar to suit. Professors Areeda and Hovenkamp describe the statute as a source of "jurisdictional rules" separate from the merits: "once the effects specified [in the FTAIA] are shown to exist, a plaintiff will then be allowed to prove, if it can, that the defendant's conduct violates the legal standards of Sherman Act §§ 1-2." 1A Areeda & Hovenkamp, ANTITRUST LAW ¶ 272h, at 360, ¶ 273c4, at 389 (2d ed. 2000). "[M]otions to dismiss for lack of requisite effects," their treatise adds, are "addressed under the standards of FRCP 12(b)(1)." *Id.* ¶ 273c4, at 43 (Supp. 2003).[10]

Finally, principles of sound judicial administration also weigh strongly in favor of the court of appeals' interpretation. Disposing of lawsuits with no substantial connection to the United States early in a case—as the jurisdictional approach allows—keeps cases involving entirely foreign conduct from being embroiled in unnecessary and burdensome litigation in our courts.

Construing the FTAIA as establishing an element of a claim means that cases with only remote and tangential connections to the United States would be left to linger in our

---

Ltd., 315 F.3d 338, 341 (D.C. Cir. 2003) (acknowledging conflict). A petition for rehearing in *Empagran* was denied on September 11, 2003.

[10] See also, *e.g.*, 2 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 1116 (5th ed. 2002) (FTAIA lays out "jurisdictional prerequisites"); Bruce & Peirce, *Understanding the Export Trading Company Act and Using (Or Avoiding) Its Antitrust Exemptions*, 38 BUS. LAW. 975, 983 (1983) (FTAIA "restricts the jurisdictional reach of the Sherman [Act]"); Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 809-810 (1986) (FTAIA "merely sets forth [a] threshold subject matter jurisdictional test").

courts. Any factual inquiry into "domestic effects" would be delayed until summary judgment and—if questions of fact remained—until jurors reached a verdict. Plaintiffs could extract costly settlements based on purely foreign conduct due to the *in terrorem* effect of the treble damage penalty and the enormous expense associated with antitrust litigation, effectively evading the Act's U.S. commerce requirements. See Posner, ANTITRUST LAW 275 (2d ed. 2001) (discussing "extortion problem" posed by immense damage awards in private antitrust actions).

Congress never intended our legal system to provide such "remedies." The judiciary's already congested dockets should not be further crowded by imported controversies such as petitioners' that have no relevance to our economy or to the enforcement of our laws. See *Hartford Fire*, 509 U.S. at 796 n.23 ("FTAIA was intended to exempt from the Sherman Act export transactions that [do] not injure the United States economy").

Petitioners ignore these considerations. They speculate (Pet. 28) that under the Seventh Circuit's interpretation, antitrust defendants will strategically withhold subject-matter objections until appeal. There would be no advantage to be gained from this tactic. Furthermore, in the unlikely event a defendant preferred to seek dismissal on an "easier merits issue" (*ibid.*), *sua sponte* consideration of subject matter jurisdiction provides a backstop, guarding against needless intrusion into the domestic affairs of other nations. See Pet. App. 16a-17a; *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies").[11]

---

[11] Any concern about extended proceedings can be alleviated if discovery is limited to the jurisdictional issue and occurs in an expedited fashion. In this case, the judge did not exercise his discretion to employ such procedures, and of the 4½ years, two were

In the face of this overwhelming support for the courts of appeals' unanimous interpretation of the FTAIA, petitioners offer essentially two additional arguments. Neither provides any basis for a different conclusion.

First, petitioners point (Pet. 13-14) to decisions in which this Court has concluded that other statutes do not restrict subject matter jurisdiction. But each case turns on an assessment of the "distinctive statute * * * at issue." *Steel Co.*, 523 U.S. at 91-92. See also *Gwaltney*, 484 U.S. at 55-66 (parsing language of Clean Water Act citizen-suit provision to determine its jurisdictional reach); *Textron Lycoming Reciprocating Engine Div.* v. *UAW*, 523 U.S. 653, 656 (1998) ("By its terms, this provision confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts'"). These cases therefore support the statute-specific approach that we have just discussed.

In *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 644 (2002), the Court refused to find an ouster of jurisdiction in the face of congressional silence. See *ibid.* (jurisdiction not "excluded expressly"). By contrast, Congress has spoken here. That explains why "after the decision[s] in *Steel Co.*" and *Verizon*, "courts of appeals [have] continue[d] to treat FTAIA as jurisdictional." Pet. App. 13a.[12]

---

consumed with personal jurisdiction challenges by certain of the foreign defendants.

[12] The FTAIA is a separate statutory provision; accordingly, there is no risk that treating it as jurisdictional will "turn every statutory question" under the Sherman Act "into a question of jurisdiction." *Steel Co.*, 523 U.S. at 92. The FTAIA inquiry turns on the locus of the effects of the challenged conduct, an inquiry divorced from the core elements of an antitrust claim. See H.R. Rep. No. 97-686, at 11, 13 (FTAIA does not affect the merits of antitrust claims); Murphy, *supra*, at 810 ("Proof of [domestic effect] does not prove the substantive violations of the statute"). Petitioners' reliance on

Second, petitioners attempt to invoke (Pet. 15) the doctrine of constitutional doubt, arguing that construing the FTAIA as jurisdictional would create constitutional problems in criminal prosecutions. Of course, this is a civil case, not a criminal one. Moreover, there is nothing constitutionally infirm about applying the FTAIA as a threshold jurisdictional standard in a criminal case. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and its progeny hold only that any facts which increase the punishment "beyond the prescribed statutory maximum must be submitted to a jury" (*ibid.*), inasmuch as they "operate as the functional equivalent of an element of a *greater offense*,'" *Sattazahn* v. *Pennsylvania*, 123 S. Ct. 732, 739 (2003). Requiring federal courts to determine if anticompetitive conduct has the requisite domestic impact neither authorizes a sentence in *excess* of statutory limits nor takes the evaluation of guilt away from the jury. See *Harris* v. *United States*, 536 U.S. 545, 549 (2002) ("not all facts affecting the defendant's punishment are elements"). Petitioners' constitutional concerns are imagined, not real.

D. Review Is Inappropriate Because The District Court's Decision Makes Clear That The Outcome Of This Case Would Not Change Even Under Petitioners' Interpretation Of The FTAIA.

Even if petitioners prevailed on the issue presented for review, the outcome would not change. For that reason, this Court should not devote its limited resources to reviewing the judgment in this case.

Subsection (2) for the contrary proposition is misplaced. The requirement that the domestic effect "give[] rise to [Sherman Act] claim," 15 U.S.C. § 6a(2), simply "make[s] it explicit that conduct involving beneficial effects is not subject to the antitrust laws." Murphy, *supra*, at 810. See H.R. Rep. No. 97-686, at 11 (no jurisdiction based on "beneficial" U.S. effects).

The court of appeals declined to address our contention that respondents would prevail even under petitioners' interpretation of the FTAIA (Pet. App. 6a),[13] but it is clear from the district court's decision that summary judgment was properly entered for respondents because petitioners did not produce *any* evidence to satisfy the requirement of a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.

As we have discussed, the district court's determination was based on the "undisputed record," replete with admissions by *petitioners'* witnesses and statements in *petitioners'* documents that, to the extent petitioners took any steps towards manufacturing at all, their chemical production facilities, sales, and customers would all have been in India.[14] See Pet. App. 54a-55a, 75a n.7; *supra*, pp. 6-10. Whether analyzed under an "element of the claim" or a "subject matter jurisdiction" framework, the result is the same. These are plaintiffs with claims of injuries sustained in foreign markets. They cannot recover in U.S. courts under any reading of the FTAIA. See H.R. Rep. No. 97-686, at 11 ("a foreign firm whose non-domestic operations were injured * * * would have no remedy under our antitrust laws").

---

[13] Petitioners assert (at 25) that the court of appeals recognized that respondents could not prevail under the summary judgment standard, but the court was very clear: "[Respondents], of course, contend that they should win under either standard, *a proposition on which we need pass no judgment.*" Pet. App. 6a (emphasis added).

[14] Because the district court rested its findings on uncontroverted evidence, in particular these documentary and testamentary admissions by petitioners, the record did not establish that a "reasonable jury could conclude" otherwise, as petitioners remarkably contend. Pet. 5. The judge did not simply "credit[] all of the facts alleged by [defendants]" (Pet. 6)—it was petitioners' own words and undisputed conduct that showed the absence of any domestic effect. See Pet. App. 49a, 66a-67a.

It would be a waste of private and judicial resources to determine whether the statute is jurisdictional or substantive in the context of a case in which that determination will make no difference. For this reason too, review by this Court is not warranted here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

ANDREW J. PINCUS
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

MARK MC LAUGHLIN
TIMOTHY S. BISHOP
Counsel of Record
ANDREW S. MAROVITZ
NICOLA JACKSON
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

BARRIE L. BREJCHA
Baker & McKenzie LLP
130 East Randolph Drive
Chicago, IL 60601
(312) 861-2782

STEPHEN NOVACK
Novack and Macey LLP
303 West Madison Street
Suite 1500
Chicago, IL 60606
(312) 419-6900

OCTOBER 2003